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Supreme Court of the United States

OCTOBER TERM, 1938.

No. 133.

THE BALTIMORE AND OHIO RAILROAD
COMPANY, *et al.*,
appellants,

vs.

THE UNITED STATES OF AMERICA, INTER-
STATE COMMERCE COMMISSION, *et al.*,
appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANTS.

L.

The Opinions of the Court Below.

The opinion of the District Court of the United States for the Southern District of New York is reported in 20 F. Supp. 273, and the concurring opinion of Judge Hulbert in 20 F. Supp. 917. A copy of each opinion appears in the printed record, beginning at page 302. There are no other opinions.

The District Court made and filed findings of fact and conclusions of law, which appear in the record, beginning at page 341.

II.**Jurisdiction.**

A statement of the grounds on which the jurisdiction of this Court is invoked was heretofore filed in accordance with the requirements of Rule 12. An order was entered on October 10, 1938, noting that probable jurisdiction had been shown.

III.**Statement of the Case.**

This is a direct appeal from a final decree of the District Court of the United States for the Southern District of New York, specially constituted of three judges, dismissing appellants' bill for injunction to set aside and restrain enforcement of an order of the Interstate Commerce Commission. The suit below was brought by seven interstate common carrier railroads* which serve and transport freight to and from the New York Harbor district. All own or control piers, warehouses and other buildings in which space is leased to shippers and others or in which storing and handling of goods are performed for shippers and others. When the storing and handling are in connection with goods in the course of rail transportation they are known as in-transit services and are covered by published tariffs (R. 36-39, 179, 303, 355), but when in connection with goods not in the course of such transportation are known as commercial or

*The Baltimore & Ohio Railroad Company,
The Central Railroad Company of New Jersey,
The Delaware, Lackawanna & Western Railroad Company,
Erie Railroad Company,
Lehigh Valley Railroad Company,
The New York Central Railroad Company,
The Pennsylvania Railroad Company.

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on-transit services and are not covered by tariffs (R. 35, 0, 124, 303).

The order complained of is dated February 2, 1937; and appears in the printed record on pages 272-274. It requires the appellants to cease and desist,

(a) *** from permitting shippers in interstate commerce over said respondents' lines to occupy space by lease or otherwise* in warehouses, buildings or piers, *"at rates and charges which fail to compensate said respondents for the cost of providing said space;"*

(b) *** from storing goods shipped over said respondents' lines in interstate commerce, or providing storage space to shippers *** for commercial storage of goods, as fully defined in said reports, *"at rates and charges which fail to compensate said respondents for the cost of storing such goods or providing such storage space;"*

(c) *** from directly or indirectly handling goods incident to commercial storage as fully defined and described in said reports, at said warehouses, buildings or piers for shippers *** *"at rates and charges which fail to compensate said respondents for the cost of said handling;"*

(d) *** from insuring goods shipped over said respondents' lines in interstate commerce and stored in connection with commercial warehousing, as fully defined and described in said reports, at said warehouses, buildings or piers *** *"at less than the cost of providing such insurance;"*

(e) *** from applying, by means of tariffs now on file with this Commission *** *"non-compensatory rates and charges,"* as fully described in said reports, for the leasing of space, storage, handling and insurance of goods shipped over their lines in interstate commerce which goods are stored, handled or insured in connection with commercial warehousing service as fully defined and described in said reports." (Italics supplied.)

* Appellants herein.

This order was made by the Commission in a proceeding entitled *Ex Parte 104, Practices of Carriers Affecting Operating Revenues and Expenses*, which the Commission began upon its own motion in July, 1931, to determine whether all the railroads of the United States, including the seven appellants, were efficiently and economically operated. For convenience the investigation was divided into different parts. While it was pending certain warehouse operators in the Port of New York district, being desirous of entirely eliminating the competition of railroad warehouses, complained to the Commission of the warehouse practices of the seven appellant railroads in the district (R. 36, 127). In January, 1932, the Commission instituted Part VI of the general proceeding, entitled *Warehousing and Storage of Property By Carriers at Port of New York*, which part, according to the order instituting it, was

"* * * directed toward establishing facts concerning all policies, practices, services and charges in connection with warehousing and/or storage of freight by carriers serving the Port of New York District, namely, the carriers to which this notice is addressed, hereinafter termed respondents" (R. 27).

The Commission promulgated its first report in Part VI, without an order, on December 12, 1933, (R. 29), its second report, with an order, on June 8, 1936, (R. 119), and its third report, with the challenged order above mentioned, on February 2, 1937 (R. 268, 272). The third report affirms the others (R. 271), except as pointed out hereinafter, *infra* page 38, and the challenged order of February 2, supersedes the prior order, (R. 271), so that the order under attack rests upon the findings in the three reports in Part VI.

These findings as to leases are substantially uniform in character and substance as to each of the seven appellant railroads, and taking those made with respect to the Central Railroad of New Jersey as representative of all the others, are as follows (R. 159):

"The Jersey Central, through its said wholly owned subsidiary, permits the occupancy, by the Newark Central Warehouse Company, of the warehouse of its wholly owned subsidiary at Newark, N. J., described of record, under leasing arrangements which fail to compensate said railroad for its cost in providing space in said warehouse."

"We find that, by means of the leasing arrangements described of record, the Jersey Central reduces below the published tariff rates the transportation charges on interstate shipments handled or stored by the Newark Central Warehouse Company, and thereby the Jersey Central grants concessions on such interstate shipments to the extent of the difference between the cost to said railroad of providing said space and the amount which it receives for the occupancy thereof.

"We further find that, through such leasing arrangements and by granting such concessions, the Jersey Central is guilty of unjust discrimination in violation of section 2 of the Interstate Commerce Act, makes and gives undue and unreasonable preferences and advantages to the Newark Central Warehouse Company and to shippers who store goods therewith, and subjects competing warehouse companies and shippers who store with such warehouse companies to undue and unreasonable prejudice and disadvantage in violation of section 3 of said act, and departs from its published tariff rates in violation of section 6 of said act." (Italics supplied.)

With respect to the storing of goods performed by all appellants the finding is that (R. 192),

"In the instant case, the carriers sell warehousing services at less than the cost of providing them * * *, and * * * in effect reduce their line-haul rates from shipside to destination on traffic stored in their warehouses."

Likewise, as to their in-transit services, the finding is that each appellant

"* * * provides by tariff publication for storage, handling, and with the exception of the Jersey Central, for

insurance of carload freight in warehouses, buildings, or piers *** at rates and charges which do not reimburse them for the full cost of providing said services independent of freight rates thereby assuming a part of the cost of conducting the commercial operations of shippers who store goods ***,

and that doing so

*** reduces below the published tariff rates the transportation charges paid by certain shippers *** and results in concessions to said shippers to the extent of the difference between the cost to said respondent of providing such storage, handling, and insurance, and the amount which they receive therefor,"

and that

*** by granting such concessions, the respondent carriers are guilty of"

violations of sections 2, 3 and 6 of the act (R. 196-197).

The substance of all these findings is that appellants make leases of property to shippers and render storage, handling and insurance service on goods for shippers at less than "cost." By failing to obtain such "cost" the Commission concludes that the carriers in effect grant "concessions" to the shippers who are their tenants and patrons and that such concessions amount to a reduction for such tenants and patrons of the published tariff rates for road-haul transportation, in violation of section 6 of the Interstate Commerce Act (49 U. S. C. §6). Such violation of section 6, it is then further concluded, in turn causes unjust discrimination and undue preference and prejudice in violation of sections 2 and 3 of the Act.

* Although "cost" is not defined with the certainty required in respect of an order for the violation of which dire penalties may be imposed, it must be inferred from the Commission's reports that "cost" is intended to be comprehensive and to include interest or return upon invested capital, depreciation, taxes and all operating and other expenses chargeable to each lease or service (R. 134, 137, 174-175).

Chairman Mahaffie dissented from the conclusions of the Commission on the ground that the below-cost findings on which they are based are insufficient in law to establish concessions (R. 198).

Appellants filed their bill with the District Court praying that the order of February 2, 1937, be set aside and that its enforcement be enjoined. The basis of the bill is that the below-cost findings made by the Commission do not establish the existence of concessions and are, therefore, insufficient in law to support the order (R. 1-24). The Commission's three reports, the challenged order and the evidence taken by the Commission were put in evidence at the hearing before the District Court, and on August 25, 1937, its opinion was handed down dismissing the bill. An order was entered on November 1, 1937, staying the enforcement of the Commission's order pending appeal to this Court (R. 320). Subsequently, on March 23, 1938, the District Court adopted its findings of fact, in the exact language in which they were submitted by appellees, and sixteen conclusions of law, and on that date entered its final decree of dismissal (R. 406). From the final decree appellants have appealed directly to this Court pursuant to Title 28, U. S. C., §345.

Appellants' position on this appeal is that the findings made by the Commission, taken at their full face value, are insufficient in law to sustain the order. Appellants' assignments of error are all to this effect (R. 407). They have not deemed it necessary to assign any errors with respect to the sufficiency of the evidence to support the Commission's findings and, therefore, the evidence is not included in the printed record on appeal (R. 413-415). Appellees have deposited the original exhibits and testimony before the Commission with the Clerk of this Court in their original form, and at their request it has been stipulated that the same may be referred to by either party (R. 423, 428). Appellants submit, however, that such exhibits and testimony have no bearing whatever upon the issues of law presented by this appeal (R. 427).

IV.**Specification of Errors.**

Appellants make the following specification of the assigned errors they intend to urge:

The District Court erred:

1. In holding that the findings of the Interstate Commerce Commission, that appellants' leasing of warehousing space to lessees, permitting the use of such space by and their rendition of services to the public at less than "cost" to appellants, are sufficient in law to establish that appellants thereby make "concessions" and are guilty of unlawful discriminations and prejudices in violation of sections 2, 3 and 6 of the Interstate Commerce Act (U. S. C., Title 49, Ch. 1).
2. In failing to hold that the Commission should have found that appellants, as a matter of law, may be guilty of making concessions, discriminations and preferences, in violation of sections 2, 3 and 6 of the Act, in connection with the leases, rentals and services referred to in said order of the Commission, only if and to the extent that appellants may be found to make leases or render services at less than the reasonable worth thereof; such reasonable worth being ordinarily measurable by the prevailing market values.
3. In holding that the findings made by the Commission and described in appellants' petition are sufficient in law to support the Commission's cease and desist order of February 2, 1937.
4. In holding that appellants in making leases and rendering services at prevailing market values, are nevertheless guilty of making concessions, in violation of sections 2, 3

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and 6 of said Act, if such prevailing market values are less than the "cost" to appellants of so doing.

5. In holding that although appellants have published and observed tariffs covering "in-transit" storage, handling and other services rendered by appellants in connection with goods that are in process of transportation over appellants' railroads, appellants may never the less be guilty, as to such services, of violations of sections 2, 3 and 6 of the Act, as found and concluded by the Interstate Commerce Commission.

6. In failing to hold that by publishing and observing tariffs covering "in-transit" storage, handling and other services rendered by appellants in connection with goods that are in process of transportation over appellants' railroads, appellants, as to such services, may not, as a matter of law, be guilty of violations of sections 2, 3 and 6 of the Act.

7. In failing to hold that said "in-transit" storage, handling and other services, for which rates and charges are and must be published by appellants in tariffs duly filed, and uniformly collected, are transportation services as defined in said Interstate Commerce Act, and that appellants' acts in compliance with said published tariffs cannot, as a matter of law, constitute concessions from appellants' published tariffs covering their line-haul transportation, in violations of sections 2, 3 and 6 of the Act.

8. In failing to hold that said order of the Commission, in that it does not permit appellants to make leases of their property and render services at the reasonable worth thereof as ordinarily measured by the prevailing market values, but instead imposes upon appellants observance of a "cost" standard not found by the Commission to have any relation to reasonable worth or prevailing market values, takes the property of appellants without due process of law and for

public use without just compensation, and deprives appellants of their liberty, in violation of the Fifth Amendment to the Constitution of the United States.

9. In failing to hold that the Commission was without authority to make the order of February 2, 1937, complained of in appellants' petition herein, because (a) the reports which are made a part of the order do not contain findings requisite to support the order, (b) the findings which the reports contain are erroneous in law, and (c) the said reports are arbitrary and contrary to previous decisions of both the courts and the Commission upholding the right of common carriers by railroad to lease property to shippers at reasonable rentals ordinarily measured by currently prevailing rentals.

10. In making and entering its final decree dismissing appellants' petition.

V.

ARGUMENT.

Summary of Argument.

1. The challenged order of the Interstate Commerce Commission condemns railroad leases to shippers upon the basic finding and ground that the rentals therein reserved are less than the cost of providing the property leased. Upon this finding alone the Commission and the District Court hold that such rentals are "concessions" to shippers from the published tariff rates for road-haul transportation, in violation of sections 6, 2 and 3 of the Interstate Commerce Act (49 U. S. C., §§ 6, 2, 3), and "probably" in violation of the Elkins Act (49 U. S. C., § 41(i)).* The order must stand or fall

* The relevant portions of these sections of the statutes are printed in the appendix, pages 46 to 49.

upon this finding, as it is neither the duty nor within the province of the Court to search the record to determine whether additional essential findings might have been made.

2. A finding that the rental in a railroad lease of real property to a shipper is below the "cost" to the railroad of providing the property leased is legally insufficient to constitute a section 6 concession to the lessee-shipper because it does not show that the shipper who pays such below-cost rental in fact receives greater value from the railroad in the form of the leasehold than he pays back in the form of such rental. *Receipt by the shipper of more value than he pays back must be shown before a concession can arise*, and that can only be shown by an express finding, which the Commission has not made, that the reasonable rental value of the lease given to the shipper exceeded the rental he actually paid. Because of that deficiency in findings the order is void as to leases.

3. The only finding that the Commission made as to appellants' storing of freight in their warehouses and piers is likewise that the charges therefor are less than the cost to the carrier of storing such freight. As to such storage that finding is, for the same reasons, insufficient to establish a concession.

4. All of appellants' "in-transit services", consisting of in-transit storage and the handling and insuring of goods in connection therewith, are covered by tariffs, and, under the Commission's express finding, must continue so to be. Appellants' full compliance with such tariffs, which is admitted, makes the existence of concessions in connection with such "in-transit services" impossible.

5. The order as to appellants' leases, storage, and "in-transit services" will, unless it is set aside and its enforcement is restrained, deprive appellants of their liberty and property in contravention of the Fifth Amendment.

POINT 1.

The Commission's order is void as to appellants' leases of real property to shippers because the basic finding upon which it rests—that the rentals in said leases are less than "cost" and therefore constitute "concessions"—is insufficient in law to support the order.

The question squarely raised is whether a bare finding that the rental reserved in a lease of railroad property to a shipper is less than cost is sufficient to establish the receipt by such shipper of a concession from the published tariff rates for road-haul transportation, in violation of section 6 of the Act. There is no claim by anyone that appellants have failed to collect full tariff rates or have made any direct refund of any part thereof to anyone.

A.

The Commission's basic finding as to leases is that the rentals therein reserved are below cost; the order must stand or fall upon that finding.

It is settled law that an order of the Commission is void unless it is supported by clear and express findings of all the facts that condition the Commission's power to make the order. In the language of Mr. Justice Cardozo in *United States v. Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, 504:

"This court has held that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power. *Florida v. United States*, 282 U. S. 194, 215; *United States v. Baltimore & Ohio R. Co.*, 293 U. S. 454."

Referring to the ruling in *Wichita Railroad & Light Co. v. Public Utilities Commission*, 260 U. S. 48, 59, this Court said in *Mahler v. Eby*, 264 U. S. 32, 44:

"We held that the order in that case made after a hearing and ordering a reduction was void for lack of the express finding in the order. We put this conclusion not only on the language of the statute but also on general principles of constitutional government." (Italics supplied.)

Nor is a broad general conclusion by the Commission in the words of the statute a sufficient finding for, in the same case, Mr. Justice Cardozo said (p. 506):

"The statement in the second of these paragraphs (of the findings of the Commission under review) that the proposed rates would be 'unreasonable' must be read in the light of the report as a whole, and then appears as a conclusion insufficient as a finding *unless supported by facts more particularly stated*. Cf. *Florida v. United States, supra*, at p. 213; *Southern Pacific Co. v. Interstate Commerce Comm'n*, 219 U. S. 433, 449." (Italics supplied.)

The only basic finding by the Commission as to leases is that the rental reserved is below the cost to the railroad of providing the property leased. There are no other relevant findings, and, in particular, there is no finding that the rental reserved in any of the appellants' leases was less than the fair and reasonable rental value of the leasehold interest. This is established beyond dispute by the findings in regard to the lease of the Central Railroad of New Jersey, *supra*, page 5, which are typical of the findings made as to the leases of all the appellants.

The whole substance of these findings is simply that by leasing property at non-compensatory rentals, i.e., at rentals "which fail to compensate said railroad for its cost in providing" the property, the railroad "grants concessions" to the lessee-shippers, and "reduces below the published tariff

rates the transportation charges" paid by said shippers. This claimed reduction is the section 6 violation referred to in the challenged order. Having in this way concluded that a below-cost rental is *ipso facto* a concession that violates section 6, the Commission declares that other violations of law follow from the concession conclusion, for it says in the findings, *supra*, page 5, that "*by granting such concessions*" the railroad is guilty of the unjust discrimination and the undue and unreasonable preference and advantage which are found to violate sections 2 and 3 of the Act. Thus, the section 2 and section 3 violations found as to leases are those flowing from the asserted concessions, or section 6 violations, which in turn arise solely from the below-cost rentals.

If anything further is needed to show this, it is to be found in the way the District Court stated and treated the issue. Referring to the Commission's findings, that Court declared that "the indirect violation of Section 6 of the Interstate Commerce Act (49 U. S. C. A. Sec. 6) by the forbidden practices has been found in that those permitted to receive such *below cost*[†] services in effect move their goods at less than tariff rates and receive preferential treatment in violation of section 3 (49 U. S. C. A. Sec. 3)". Again it stated that, "The power to make the order, therefore, depends upon whether the providing of such services as were found to have been furnished for *less than cost* violates the act in that some shippers are given more favorable treatment than others in like situation". It then declared that, "To the extent that such *cost* is not returned, the tariff rates for the transportation are in effect reduced as much as though a rebate to such shippers to the amount of the carriers' loss had been paid. *And this is so whether the voluntary commercial services performed by the carriers * * ** are charged

* 20 F. Supp. 273, 276.

† All italics supplied.

at their *fair value* or not. If the carriers sustain losses in performing voluntary commercial services for shippers *** it can make no difference, in the effect of such practices on the tariff rates, that the voluntary commercial services were charged at their *fair value* if that happens for whatever reason to be less than the cost to the carriers. To the extent that the carriers are out-of-pocket because of the performance of such voluntary commercial services in connection with transportation furnished a shipper, their published tariff rates for such transportation are cut ***. "That is the vice", the Court continued, "the order is designed to do away with and it will not be cured if the *fair value* standard is substituted for the *cost* standard in respect of commercial services ***. If the cost to the carriers of the inducing commercial services performed is more than the charges for those services, the lessening effect upon the published tariff rates for transportation and the consequent violation of the act follow as surely whether the commercial services are charged at their *fair value* or not. In other words, *fair value* is immaterial except on the question of efficiency in connection with the determination of loss".

While the foregoing extracts do not in terms specifically mention railroad leases to shippers at below-cost rentals, it is clear from the whole opinion that those extracts were intended to comprehend all the practices condemned by the order, for the Court concludes: "So we agree with the Commission that the condemned practices do violate the act and hold the order supported by the findings and generally within the scope of the Commission's power".

Should it be urged that some statements in the Commission's long and discursive reports may be accepted as findings in addition to the below-cost finding, "the difficulty is that it [the Commission] has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences." *United States v. Chicago M. St. P. & P. R. Co.*, 294 U. S. 499, 510.

All that the Commission has said "with simplicity and clearness" is that rentals are below cost, and on that specifically is the order based. Quasi-jurisdictional facts, or, as the Court described them at page 510 in the opinion just cited, "the facts that control the validity" of the Commission's order, must be expressly found. They cannot be supplied by implication or inference, nor will the Court search the record to supply missing essential findings. This is the rule, even though the Court examining the statements of fact in the Commission's report, "would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning." *United States v. Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, 510.

The settled law, declared by this Court in *Florida v. United States*, 282 U. S. 194, 215, is that,

"In the absence of such findings (the basic or essential findings required to support the Commission's order), we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported."

And again in *Atchison T. & S. F. Ry. Co. v. United States*, 295 U. S. 193, 201, it was squarely decided that an order of the Commission must stand or fall upon such findings alone as that body makes to support it, and that the Court will not search the record to ascertain whether the additional necessary findings might have been made. In stating this principle the Court said of the Commission's report and order there in issue:

"* * * Its report does not disclose the basic facts on which it made the challenged order. This court will not search the record to ascertain whether, by use of what there may be found, general and ambiguous statements

in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for the order. In the absence of a finding of essential basic facts, the order cannot be sustained. *Florida v. United States*, 282 U. S. 194, 215. Recently this Court has repelled the suggestion that lack of express finding by an administrative agency may be supplied by implication". Citing *Panama Refining Co. v. Ryan*, 293 U. S. 388, 433. See *Beaumont, S. L. & W. Ry. v. United States*, 282 U. S. 74, 86. *Interstate Commerce Comm'n v. Chicago, B. & Q. R. Co.*, 186 U. S. 320, 341.

The same principle governs the determination of the validity of the orders of other administrative tribunals. In *General Utilities & Operating Co. v. Helvering*, 296 U. S. 200, 206; this Court held that:

"The Court of Appeals is without power on review of proceedings of the Board of Tax Appeals to make any findings of fact. The function of the court is to decide whether the correct rule of law was applied to the facts found; * * * If the Board has failed to make an essential finding and the record on review is insufficient to provide the basis for a final determination, the proper procedure is to remand the case for further proceedings before the Board. *And the same procedure is appropriate even when the findings omitted by the Board might be supplied from examination of the records.*" (Italics supplied.)

In the instant case the Commission has not found that the rentals reserved in the appellants' leases were less than the fair rental value of the leasehold interests; and the lower Court held* that "fair value is immaterial": As presently will be shown, this is the basic, quasi-jurisdictional fact that conditions the power of the Commission to declare the existence of a concession in connection with such leases. Under the doctrine of the decisions just reviewed that fact can-

* 20 F. Supp. 273, 277 (R. 309)

not be supplied by inference or implication. The order, therefore, must stand or fall upon the below-cost finding alone, without benefit of any other findings the lower Court may have undertaken to spell out and make from the evidence before the Commission.

Moreover, the "cost" standard is specifically imposed by the Commission's order itself, appellants being forbidden to make leases at less than "cost". It follows, *a fortiori*, that no statement in the Commission's reports or in the lower Court's findings, other than the below-cost finding, may be considered. Even if the Commission or the lower Court had found facts which would support an order made upon some other legal theory, those facts could not support the present order because that order on its face excludes all except the "cost" theory.

Appellants contend, therefore, that the sole issue now before this Court as to appellants' leases is the sufficiency of the below-cost finding which the Commission made and with which alone the lower Court dealt in its opinion.

B.

The finding that the rental in a railroad lease of real property to a shipper is below "cost" is insufficient in law to establish a "concession".

The fundamental fallacy in the decisions of both the District Court and the Commission is the holding that there can be such a thing as a concession to a shipper that will cut the published tariff rates for his transportation in violation of section 6 without a finding that the shipper really got something of value that he did not adequately pay for. It is not what it may cost the carrier to give to the shipper what he got, but rather what the thing given was reasonably worth at the time and how that worth compares with what the shipper paid, that are significant. If the recipient is found to have given less than the fair value

of the thing received then in truth has something been conceded to him. But until it is found as a fact that what the recipient got from the railroad exceeded in value what he gave in exchange the recipient plainly has no excess value that he can apply as a credit against the tariff rates, and the indispensable element of a concession is wanting.

Applied to this case and stated briefly, this means that in order to establish a concession arising out of appellants' leases to shippers it must be found clearly and expressly that the lease in each instance had a fair rental value (as measured by the prevailing market and other relevant facts) in excess of the amount of rental the shipper actually paid. In no other way can it rightly be held that there was a concession. That indispensable finding is wholly lacking.

The courts have continuously held that, before there can arise a concession in diminution of a published tariff rate for transportation, it must be made to appear that some element of value is given by the carrier over and above what the recipient shipper gives in return. The concession exists only by reason and to the extent of the excess value the shipper receives. This sound principle permeates and characterizes the decisions.

Payments "made by a carrier to a shipper in consideration of his shipping goods over the carrier's lines" were held to be concessions that cut "its published rates on file" by this Court in *Lehigh Valley R. R. Co. v. United States*, 243 U. S. 444, 446. In that case the things of value the shipper received, for which he did not pay and which measured the concession, were the money payments from the carrier, it being held that the shipper's act of shipping, which was the consideration recited, was not in law a good consideration.

In *Wight v. United States*, 167 U. S. 512, a carrier, whose published rate covered only the haul from Cincinnati to its yard in Pittsburgh, undertook without further charge to dray the freight from its yard to the consignee's place of business, and later to make an allowance to the consignee for doing

the drayage. It was held that this drayage service, being a thing of value given by the carrier beyond the scope of its transportation duty, and for which the consignee paid nothing, amounted to a concession from the tariff rate for the line-haul service, to the extent of the worth of the drayage. It thereby produced unjust discrimination between the consignee who got the concession and one who did not. In its opinion in *Mitchell Coal Co. v. Pennsylvania R. R. Co.*, 230 U. S. 247, 260, this Court observed, with respect to the situation presented in the *Wight* case, that, "Paying the favored consignee for rendering a service the carrier was not bound to furnish, was a gift—a rebate—a thing *ipso facto* illegal and prohibited by the statute * * *." It was this "gift" of something of value for which nothing was given in return that was the essence of the adjudged concession.

The *Mitchell Coal Company* case, just mentioned, is one in which this Court dealt with the question whether allowances by a carrier to coal mining companies for "bringing their coal over the spur track to the junction" were unlawful rebates or concessions from the tariff rate which, it was found, covered the entire haul from the mines, including the haul over the spur track. In holding (p. 263) that the allowances were lawful "only when supported by a consideration," and (p. 265) that "They became unlawful only when unreasonable," i.e., too high for what the shipper did in exchange for the allowances, the Court was but giving full effect to the principle, here under discussion, that there is *and can be no concession that cuts the tariff rate until it is affirmatively found that something of value moves from the carrier to the shipper in excess of that which the shipper gives back in return*, or, as stated in the syllabus, "unless and until there has been a finding by the Interstate Commerce Commission that the payments so made to the other shippers were unreasonably large."

Only recently this principle was again affirmed in *United States v. American Tin Plate Co.*, 301 U. S. 402, wherein this Court upheld an order of the Commission that con-

denmed a carrier's performance of car spotting service, or payments to the industry for performing such service, beyond the point where the line-haul service covered by the tariff began or ended. This performance of or payment for the spotting service, which the carrier was not required to perform under the tariff rate for transportation, was the thing of value given by the carrier, for which the shipper gave nothing in return, that constituted and measured the concession in violation of section 6 of the Act.

In the lower federal courts also there are many well-considered decisions uniformly holding that concessions arise only because and to the extent that the facts show receipt of more value by the shipper than he gives back to the carrier in return.

Davis v. Southern Pacific Co., 235 Fed. 781, 737, is one wherein the lower court condemned as concessions agreements between a carrier and all hop growers indiscriminately, whereby, in consideration of their hop shipments over the carrier's railroad from San Francisco to the East "at the full tariff rate for that transportation the carrier would "reimburse them for all local charges in the way of local freights, cartage, warehouse, and similar charges necessary to transport such freight to the port of San Francisco, * * *." The manifest concession from the tariff rate for the haul east from San Francisco arose from the fact that each hop shipper definitely got something of value from the carrier for which he did not pay at all, namely, the local carriage, cartage and warehousing incident to getting his hops into San Francisco preparatory to their movement east. It was those things of value given by the carrier, without any charge at all, that constituted the unlawful concession.

The decision of the Circuit Court of Appeals, Second Circuit, in *Aron v. Pennsylvania Railroad Co.*, 80 F. (2d) 100, (*certiorari denied*, 298 U. S. 658) is particularly in point. The action there was by a livestock shipper to recover from the carrier certain unpublished and unfiled charges paid to the carrier for the service of unloading and reloading live-

stock in transit for rest as required by the 28-Hour Law, 4 U. S. C., §§71, 72. After declaring that these services were "transportation", the court went on to decide that the shippers "did not, as they contend, suffer damages in the entire amount paid, but only insofar as the amount charged exceeded a reasonable rate for the service rendered" by the carrier, and further that, "The determination of damages in the instant case involves a finding of a reasonable rate, and the court will not determine that question without a prior finding by the commission". (Italics supplied.) If it is the law that a determination of damages in such a case, where it is claimed that the carrier charged too much for the service rendered, necessitates a preliminary finding by the Commission as to the reasonable value of what the carrier gave the shipper, a like finding of reasonable value can be no less required in the converse situation where, as here, it is claimed that the carrier gave a rebate by charging too little for the leasehold given the shipper.

There remain to be considered the cases upon which the Commission and the lower Court specifically relied, viz., *Cleveland, C. C. & St. L. Ry. Co. v. Hirsch*, 204 Fed. 849; *Central of Georgia Ry. Co. v. Blount*, 238 Fed. 292; *Vandalia Ry. Co. v. United States*, 226 Fed. 713, and *New York N.H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361. Instead of supporting the order we submit that each of these cases condemns it.

In the *Hirsch* and *Blount* cases railroad lessors sued to set aside certain leases to shippers upon the express admission and allegation that the rentals were unlawfully low; being in the *Hirsch* case "more than \$2000 less than its true rental value" (204 Fed. 849, 852); and in the *Blount* case "grossly less than the fair and reasonable rental value of the premises" because no rental at all was specified (238 Fed. 292, 294). Upon facts showing so definitely that each shipper tenant got from the railroad a leasehold having value substantially in excess of the rental given in return by the ship-

per, the unlawful concessions found by the Circuit Courts are obvious.

The *Vandalia* case is one where a coal company got a loan from a railroad company at 2%, although the railroad company itself contemporaneously borrowed and paid 4% on the money loaned and, as the opinion shows, the 2% rate "was far below the market rate", and the coal company "was not in a position to borrow it at 2% as a regular banking proposition or from any ordinary sources". It would be difficult to conceive a factual situation more clearly showing that what the shipper received had a value substantially in excess of what he gave in return. It was the excess of value received in the form of a loan, reasonably worth 4% but for which the shipper paid only 2%, that constituted and measured the concession.

The *New Haven* case (200 U. S. 361) was accepted by the Commission and the District Court as authority requiring adoption of the cost standard and, therefore, calls for particular analysis. Concerning that case that Court said, "In any event, we think the cost basis has been approved by authority which binds us" (20 F. Supp. 273, 276; R. 306). Appellants cannot too strongly urge the error of such an interpretation of that decision.

The facts were that the Chesapeake and Ohio Railway Company contracted to buy coal from mines on its line in Virginia and, at the same time, further contracted to sell and deliver the same coal to the New York, New Haven and Hartford Railroad Company in Connecticut at a delivered price of \$2.75 per ton. This price was less than the cost of the coal to the Chesapeake and Ohio at the market price at the mines plus the rail tariff charges and water transportation costs to Connecticut.

The question decided in the *New Haven* case was stated by the Court at page 390 as follows: "Has a carrier engaged in interstate commerce the power to contract to sell and transport in completion of the contract the commodity sold, when the price stipulated in the contract does not pay the

cost of purchase, the cost of delivery and the published freight rates?" As thus stated, the question manifestly relates to a contemporaneous transaction of purchase and sale of chattels. In such a transaction the cost of the commodity ordinarily would be its then fair market value; and that the Court so regarded cost in the *New Haven* case is apparent from its use interchangeably of the terms "cost" and "market price" (Opinion, pp. 384, 388).

Cost and fair market value being the same, it obviously follows that an immediate resale of the same commodity by the carrier to a shipper, and its transportation for the shipper, all for a total price less than the cost [fair market value] of the commodity plus the tariff rate for the transportation, is simply another exemplification of the principle of the case already cited. That is, it shows that the shipper got from the carrier a total value [goods at their market value, plus transportation] in excess of the value he gave in return.

The significant fact in all this is that the cost of the goods was the equivalent of their fair market value, and this fact was wholly disregarded by both the District Court and the Commission. In the instant case, on the contrary, the carriers' transactions of acquiring and investing in the real estate leased to shippers were not contemporaneous with the lease transactions. For example, in the case of the lease of the Newark Warehouse by the Central Railroad of New Jersey, which is specifically referred to in the Commission's order (R. 274, 234-235) the carrier's investment was made in 1906 while the lease was made in 1934—twenty-eight years later. Nor has the Commission found *aliunde* the fair market value of any of the leases at the time they were made. There is in the instant case, therefore, nothing by way of finding or otherwise to identify cost with fair market value of the leases.

Furthermore, it should be noted that the delivery price of \$2.75 per ton, in addition to being less than the cost or market value of the coal at the mines plus transportation

charges, was also less than the market value of the coal in Connecticut. This fact is indicated by the recital on page 388 of the Court's opinion that in 1900 and again in 1902 when the Chesapeake and Ohio failed to make deliveries according to schedule under the 1896 contract, the New Haven Railroad "bought coal in the open market" to make up the shortage. It paid in 1900 \$160,000 and in 1902 approximately \$103,000 more for the then undelivered quotas than the contract price, and made damage claims for these amounts against the Chesapeake and Ohio. It may fairly be inferred from these facts, and it appears from the record in the case, of which this Court will take judicial notice *National Fire Ins. Co. of Hartford v. Thompson, et al.*, 281 U. S. 331, 336, that early in 1903 at the time of the contract in question, the same difference between the Connecticut market price and the contract price continued to prevail.

This undeniable excess of value over the contract price, whether measured by the cost or market value at the mines or the market value at destination, brings the *New Haven* case squarely within the principle of the other cases above cited by showing beyond question that the Chesapeake and Ohio, as the vendor-carrier, gave to the New Haven, as the vendee-consignee, substantial value in excess of what the New Haven paid in return. It was this excess of value received by the railroad patron over and above the value given back by it to the Chesapeake and Ohio that constituted and measured the section 6 concession and the consequent section 2 violation which this Court found in that case.

Moreover, as appears on page 405, this Court's injunction, as it finally issued in the *New Haven* case, significantly did not mention "cost", as does the order here challenged. It merely restrained "the Chesapeake and Ohio from taking less than the rates fixed in its published tariff of freight rates, by means of dealing in the purchase and sale of coal". That requirement can only be met by exaction of fair market value, or cost if, as in the *New Haven* case, cost may be taken to be market value, which it cannot be in the instant case.

So, the *New Haven* case, like all the others, is no authority for the sufficiency of the particular below-cost finding here made as to leases.

Further citation of the authorities is unnecessary. Those mentioned suffice to make clear how definitely it is established by controlling precedent that there can be no cutting of the line-haul rate in a shipper's behalf, and consequent concession in violation of section 6, unless and until it is found as a fact that the value of what is claimed to be the concession actually exceeds the value of what the shipper gives in return for it. That essential finding has not been made in this case. All that has been found is that the shipper got a lease for which he paid a rental less than the "cost" to the carrier of providing the lease. That is not enough. It affords no basis at all for comparing what the lessee paid with what the lease was reasonably worth. Until that comparison is made and it definitely stands forth upon the fact of the express findings that the shipper-lessee got more than he paid for, the findings fall short, under the unbroken line of authorities cited, of showing a concession.

The error of the lower Court and of the Commission lies in their treatment of the matter solely from the standpoint of what it cost the carrier, upon the basis of its investment in the property, to give the lease, rather than from the correct standpoint of what was the reasonable value of the leasehold the shipper received in comparison with what he paid.

Cost to a lessor of such a thing as real property in which the element of time of ownership and circumstances and amount of former investment play such an important part has not been shown either by the lower Court's opinion, the Commission's findings, or by any human experience of which this Court may take judicial notice, to have any fixed or ascertainable relation to the reasonable value of a leasehold subsequently made under different conditions in the real estate market. On the contrary, the absence of any such relation is clearly recognized in the decision of this Court in *Standard Oil Co. v. Southern Pacific Co.*, 268 U. S. 146, 155.

where it was squarely held that "market value" at the time of loss, rather than cost, is the measure of damages for loss of a vessel. And "in view of changed prices" (p. 157) between the dates of construction and loss of the vessel [just as in the instant case between the dates of original investment in and lease of the property] the Court affirmed that, "the original cost of the vessel was not useful as a guide to her value when lost".

Mr. Justice Brandeis well stated the same lack of relation between cost and fair value in his dissenting opinion in *St. L. & O'Fallon R. Co. v. United States*, 279 U. S. 461, 494, when he said:

"* * * It is common knowledge that the current market values of many office buildings and residences constructed prior to the World War have failed to reflect the greatly increased building costs of recent years, although the need of new buildings of like character was being demonstrated by the large volume of construction at the higher price level. Many railroads built before the World War have never been worth as much as their original cost, because high construction cost combined with adverse operating conditions and limited traffic have at all times prevented their earning, despite reasonable rates, a fair return on the original cost."

There is nothing strange or unusual in the circumstance that present fair value of leases may not equal "cost", if calculated to include, as the Commission's reports seem to contemplate, interest and depreciation on investment at some *unstated rates*, and taxes. As an example, it was the common opinion when the Transportation Act, 1920, was enacted that actual values of railroad property were less than the costs reflected in the property investment accounts. 59 Cong. Rec., Part 1, pp. 126, 135-136, 224, 228, 905. In the instant case also, the Commission's reports show (R. 56, 70, 77, 88, 170) that most of the buildings in which the carriers have leased space to shippers were constructed in the years after the war and prior to the depression when, as the Court

will judicially notice, price levels and all property values were materially higher than have prevailed since the collapse, when the leases here in issue were made. *A. T. & S. F. Ry. Co. v. U. S.*, 284 U. S. 248, 260; *Great Northern Ry. Co. v. Weeks*, 297 U. S. 135, 149.

Proceeding further upon the unsound cost theory, the Court below went so far as to hold that a loss due to leasing property at a rental below cost necessarily reduces, by the amount of the loss, the carrier's "true net transportation return" from the tariff rates for transportation charged the shipper, and that such loss is automatically and correspondingly a gain by the shipper. Simply stated, the argument is that every railroad loss or reduction in "net transportation return" is somebody's concession or rebate. To state the proposition, we submit, is to disclose its fallacy.

A carrier may dissipate its revenue derived from the tariff rates on a given shipment in many ways. But mere dissipation cannot constitute a concession. Unless the loss sustained by the carrier also has the effect directly or indirectly of giving the shipper something of value over and above what he pays, there is, and in the very nature of things can be, no reduction in the tariff rates paid by the shipper, and therefore no concession from the standpoint of the shipper. It is not what the carrier retains as a net transportation return, but what the shipper pays, in relation to what he gets from the carrier, that determines whether or not the shipper has paid and borne the full tariff rate. It is not what the carrier loses, but what the shipper gains, if anything, from the lease, that controls. And the shipper does not receive anything of value which reduces the tariff rates that he pays, if in the lease transaction he pays as a rental the fair and reasonable current rental value of the leasehold interest. The cost can affect the carrier's loss, but only the present fair rental value can determine the shipper's gain as measured by the rental paid.

No one, of course, would contend that there could be a concession or rebate where the "net transportation return"

is either reduced or even wiped out entirely by reason of paying the shipper's proper damage claims, or by reason of accidents or other transportation conditions which so increased the cost of the carrier's service as to leave no net return on the particular shipment. Conversely, would anyone be so rash as to claim that there would be no concession in a lease by a carrier of valuable land to a shipper rent free because, due to a former land grant, it had cost the carrier nothing? Yet such would be the logical and necessary consequences of the lower Court's and Commission's cost theory.

The fallacy of the cost rule laid down by the Commission and upheld by the lower Court will perhaps appear even more plainly if we apply it to the sale of real property by a carrier to a shipper. Clearly a carrier has a right to sell surplus real property to a shipper for a consideration measured by its present market value. It cannot in reason be contended that the shipper receives a rebate because he is not required to pay what the property cost the carrier, if that is more than the property is worth at the time of sale. In the application of the principle here involved, we submit, a lease of real property cannot be distinguished from its sale.

In seeking to continue to make leases of real property to shippers and others on the basis of the current fair rental value of the leasehold interest, appellants are not asking for any new rights or privileges or for any change in the existing law. From the beginning of railroad history in this country rail carriers have continuously exercised the right to make leases on the basis of current fair rental value, and in so doing have uniformly been upheld by the decisions of this Court and other courts, as well as by the Commission itself. Such leases have met with approval even though the lessees, by reason of the proximity of the leased property to railroad stations, have had thereby certain advantages over other shippers who were unable to secure such leases. *Donovan v. Pennsylvania R. Co.*, 199 U. S. 279; *Louisville & Nashville Ry. Co. v. West Coast*

Naval Stores Co., 198 U. S. 483; *Missouri-Pacific Ry. Co. v. Nebraska*, 164 U. S. 403; *Andrews Bros. Co. v. Pennsylvania R. Co.*, 123 I. C. C. 733; *Williams-Thompson Co. v. A. & W. P. R. Co.*, 126 I. C. C. 417; *Johnson, etc., Lumber Co. v. Union Pacific R. Co.*, 219 I. C. C. 125.

The right to lease at rentals measured by current rental value is plainly recognized in this Court's statement in *Interstate Commerce Commission v. Chicago Great Western R. Co.*, 209 U. S. 108, 119, that, subject to the prohibition of the Act against discrimination and preference and its requirement for reasonable charges, carriers are free, as at common law, "to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits".

The Circuit Court of Appeals, Sixth Circuit, in *Cleveland, C. & St. L. Ry. Co. v. Hirsch*, 204 Fed. 849, so much relied upon by the Commission and the Court below, was careful to point out that, "This [the power of Congress under the Act to denounce concessions] in no wise militates against the right of a carrier to let or permit the use of its property at a reasonable rental". The Circuit Court's frequent references to "rental value", "rental value of its property at the date of the" lease, "rental value, not reserved", "excess in rental value", and "excess in rental value over the rent reserved", are all in full recognition of the right to make leases at the fair and reasonable rental value of the leasehold.

So also in *Central of Georgia Ry. Co. v. Blount*, 238 Fed. 292, 296, the Circuit Court of Appeals, Fifth Circuit, applied the rule of "reasonable adequate rental".

United States v. Northern Pac. Ry. Co., 18 F. (2nd) 299, 304, is particularly illuminating in this connection because the District Court therein reaffirmed the right of carriers to make leases at "the fair and reasonable rental value of the property." The Court further pointed out that "The reasonableness of the rents involves questions of fact rather than of law", and that where a group of leases is involved,

as in the instant case, they cannot be properly combined for wholesale treatment as the Commission has done. Instead, the Court said that the leases "differ materially in important details having direct bearing on the reasonableness of the rentals reserved, and each case will have to be considered separately in the light of its own peculiar facts. It is not possible to consider the leases *en bloc* and determine the reasonableness of rentals in any general or abstract way."

The right to lease at fair rental values is also sanctioned in the Commission's settled administration of the Act. After a general investigation of the whole subject in *Leases and Grants By Carriers To Shippers*, 73 I. C. C. 671, 683, involving the same leases as were dealt with by the Court in the case just referred to, the Commission endorsed the reasonable rental value standard in its conclusion stated as follows:

"We shall go no further in this report than to indicate some of the underlying principles which, in our opinion, should govern carriers in the leasing of lands to shippers and which are illustrated by the evidence which has already been summarized:

"1. No justification exists for the leasing of railway lands to industries at a nominal rental charge.

"4. Every effort should be made by carriers to obtain, when leasing land to shippers, terms no less favorable than would be obtained, under similar conditions and restrictions of use, were the land owned independently of the railroad." (Italics ours.)

Again in *Wharfage Charges at Atlantic and Gulf Ports*, 157 I. C. C. 663, 692, the Commission declared:

"That every effort should be made by carriers when leasing their warehouses to shippers to obtain terms no less favorable than would be obtained, under similar restrictions and conditions of use, were the warehouses owned independently of the railroad."

Can it be that these long-standing precedents are now to be overturned by adopting the rule that rentals must conform to cost, in total disregard of the current rental value of the leasehold, or else be condemned as concessions in violation of section 6? Is cost to be the standard when, as shown, the lessor's cost in no way measures the amount of leasehold value the lessee receives?

If the cost standard were in fact a means necessary to prevent concessions to shippers, appellants could not, of course, be heard to complain. But it is definitely not such means. On the contrary, the imposed cost standard would itself be a cause rather than a cure of concessions. The command that it be observed will create a dilemma upon one or the other horn of which appellants cannot escape impalement. On the one hand, when cost is *less* than current fair rental value of the leasehold, as we have shown it may well be, a lease at cost is bound to be a concession. If cost is, for example, fifty cents per square foot computed upon some prior low investment, while the fair rental value in the prevailing market is sixty cents per square foot, a lease at fifty cents, although it covers cost, would unquestionably constitute a concession of value to the lessee to the extent of ten cents per square foot. If it should be suggested that in such circumstances the carrier would be compelled by law to observe the higher fair rental value rather than cost, the answer is that such a suggestion conclusively demonstrates the fallacy of the whole cost rule. If cost cannot control when fair rental value is higher, by the same token it cannot control when fair rental value is lower, than cost.

The other horn of the dilemma would threaten when cost exceeded the fair rental value in the prevailing market. Observance of the cost rule then, as required by the order, would be a complete bar to any leases. Prospective tenants would not pay higher than the fair rental value established by the prevailing market, and appellants would suffer total

deprivation of the use of their property, with no offsetting benefit of any kind to any one.

All this unlawfulness and uncertainty are avoided by continued adherence to the sound and workable doctrine that leases may be made on the basis of the fair rental value of the leasehold, as determined by current market prices and other relevant facts. Such a standard preserves absolute equality among shippers in so far as leases are concerned, and gives to them no concession whatever for the reason that what they pay is the equivalent of the fair rental value of the leases they receive.

The challenged order will have a most vital and revolutionary effect, not only upon appellants, but upon all railroads throughout the United States, in connection with their right, heretofore universally recognized, to make leases for reasonable market rentals. The far-reaching effect and hardship to the shippers and carriers of the whole country of the adoption of a rigid cost or investment standard as the test of lawful rentals, without any requirement for finding or even considering fair rental value, are incalculable.

Railroads not only now have properties that must be leased in the interest of efficient and economical operation, but in the normal course of their business other leasable properties necessarily will be acquired through the lifting of sidetracks, the abandonment of unnecessary branches, the requirement to purchase properties larger than necessary for the elimination of grade crossings and otherwise. If the leasing of these properties is to be prohibited except upon a cost basis, rather than fair rental value, it is self-evident that many properties purchased or acquired during the last twenty years, particularly prior to the depression, cannot be leased at all, for no one will pay a rental based upon cost when that rental exceeds the fair rental value. Appellants' prayer therefore is that this Court hold null and void the impossible and unworkable order of the Commission that rigidly imposes the cost standard.

POINT 2.

The finding that appellants store goods for shippers at less than cost is insufficient in law to establish a concession; and the Commission's order based thereon is void.

Several appellants, either directly or through subsidiary companies, provide facilities and themselves store the goods of shippers. When the storage is of goods in the course of rail transportation it is known as in-transit storage, and the rules and regulations under which it is performed, together with the charges assessed therefor, are all contained in tariffs duly filed and admittedly observed by appellants (R. 103, 305). When, on the other hand, the storage is of goods not in course of rail transportation it is known as non-transit or commercial storage, and the regulations and charges therefor are not required to be and are not published in tariffs. The tariff aspect of the in-transit storage will be dealt with in Point 3. What is here said about it and non-transit storage relates to the insufficiency of the below-cost finding.

The Commission's finding with respect to appellants' performance of both the in-transit and the non-transit storage is exactly the same as its finding with respect to their leases, namely, that they are performed at charges that are less than cost (*ante*, p. 5). This asserted below-cost character of the charges is what the Commission concluded causes section 6 concessions from the tariff rates for road-haul transportation in favor of the owners of the goods stored who are shippers. By paragraph (b) of the challenged order, appellants are therefore commanded to cease and desist from performing all such storage of goods at rates and charges which fail to compensate them "for the cost of so doing".

All that has been set forth under Point 1 to show that a below-cost finding as to the rentals in appellants'

leases to shippers does not establish the existence of concessions, likewise shows that a below-cost finding as to appellants' charges to shippers for storage is equally deficient as proof of concessions. As in the case of appellants' lenses, there is as to their storage services no finding whatever of their fair and reasonable value at the time they were given to the shippers.

The storage services of appellants are all performed in railroad piers, warehouses and buildings, the cost of which measures the capital charge that is a component element to be included in determining the storage cost. To calculate the cost of these services as required by the order involves, therefore, the use of the same real estate investment or cost as has been shown with respect to leases to be wholly unrepresentative of fair market value. The cost of storage so calculated has not been shown by any finding in this case to have any fixed or ascertainable relation whatever to the fair and reasonable value of the storage performed by appellants for shippers. On the contrary, all that has been said to show the lack of any relation between the cost and value of leases applies with equal force to storage.

Storage services on appellants' real property are not instances of contemporaneous purchase and sale of goods or services as to which, as in the *New Haven* case, the Court may accept cost as the equivalent of fair market value.

The Commission's report and order do not purport to measure appellants' charges for storage services against the fair and reasonable value of those services and, therefore, must be held invalid.

POINT 3.

The storage, handling and insurance by appellants of freight "in transit" are services covered by duly filed and admittedly observed tariffs. The below-cost finding as to such services is insufficient in law to establish a concession and the Commission's order based thereon is void.

Appellants store, handle and assume liability for fire damage to goods of shippers while "in transit" in railroad piers and buildings in the New York Harbor district. These are the services referred to throughout the case as "in-transit" services. The rules and regulations under which these in-transit services are performed and the charges assessed therefor are all contained in tariffs duly published, filed and admittedly observed by appellants as required by the Act (R. 108, 305.).

Briefly stated, the in-transit arrangement is a long-standing one whereby westbound freight, for example, from the New York Harbor district, is received by the railroad at a freight station and thence transported to and placed in a railroad warehouse, pier or other facility, generally on the west side of the harbor. A local rate is published in tariffs and collected for this transportation. The freight is held in storage by the railroad, subject to published tariff charges covering the storage and incidental handling. The shipper has the right, at any time within a designated period after the storage begins, to direct the further transportation of the goods to any point in the West, at the balance of the through rate; i.e., he gets the same through rate for transportation as he would if he shipped the goods for uninterrupted movement from the origin point in the New York Harbor district to such western destination. When the outbound rail move-

ment from the in-transit storage point occurs the inbound local-rate paid at the time the freight went into storage is credited toward the payment of the through rate. Storage and handling charges are, of course, in addition to the charge for the road-haul transportation.* The preservation, during the storage period, of the right to the through rate gives to the freight while stored an "in-transit" status. All rules and charges concerning these services and privileges are published in appellants' tariffs (R. 190, 201, 273).

The Commission's finding with respect to these in-transit storage, handling and insurance services is exactly the same as the finding with respect to leases and non-transit storage; namely, that they are performed at charges less than cost (*ante*, pp. 5-6). The cost of the in-transit storage has the same component element of capital or investment charge for the use of the building or pier as is present with leases and non-transit storage. Therefore, as shown in Point 2, the Commission's order as to in-transit storage is subject to the same defect that is inherent in the order with respect to leases and non-transit storage.

There will now be considered additional defects in the order as it applies to all "in-transit services": storage, handling and insurance. These additional defects exist not only where, as in the case of storage, the element of historical cost of a building enters in, but also; as in the case of handling and insurance, where the historical cost element is lacking.

The asserted below-cost character of the charges for all in-transit services, notwithstanding that they are all published in tariffs admittedly observed, is condemned as causing section 6 concessions; the Commission asserts that, thereby, the shippers get a reduction from the tariff rates for road-haul

* During the storage period, appellants (except the Central Railroad of New Jersey), upon request by the shipper and payment of the additional charges named in the tariff, will also assume, on the stored freight only, liability for loss by fire (R. 39).

transportation. This is made indisputably plain by the statement in the Commission's third report that,

"What is here condemned is the fact that the respondents have voluntarily engaged in storage and warehousing services which are not within their common-carrier obligations, and by providing such services to shippers below the cost of such services, reduce the cost to said shippers for the transportation of their goods" (R. 271).

By paragraphs (b), (c), (d) and (e) of the challenged order appellants are commanded to cease and desist from performing such in-transit storage, handling and insurance of goods "at rates and charges which fail to compensate them "for the cost of so doing" (aite, p. 3).

The Commission in its first two reports (R. 28, 119) and first order (R. 199) held that storage, handling and insurance in connection with in-transit freight were not "transportation" and were not, therefore, lawful subjects of tariff publication. In its third report it reversed itself in this respect and said:

"* * * we find and conclude that respondents are correct in their contentions that such rates and charges should be published in tariffs filed with us, and that we erred in ordering the cancellation of those tariffs on the ground that the 'services provided by such tariffs are not properly subjects of tariff publication'" (R. 271).

This conclusion, that appellants' charges for in-transit services are and should be published in tariffs, is in irreconcilable conflict with the final findings and order that, to the extent appellants get less than cost for the in-transit services they are guilty of concessions. In finally requiring the filing of tariffs covering in-transit services, appellants submit that the Commission has determined, as under the decision in *United States v. American Tin Plate Co.*, 301 U. S. 402, 408, it was empowered to do, that they are "transportation" services within the meaning of sections 1(3) and 6(1)

of the Act. That conclusion is compelled by this Court's decision in *Cleveland, C. C. & St. L. R. Co. v. Dettlebach*, 239 U. S. 588, where in pointing out the scope of the "enlarged *** definition of the term 'transportation,'" in the Hepburn Act amendments to the Interstate Commerce Act (34 Stat. 584, c. 3591), the Court said:

"From this and other provisions of the Hepburn Act it is evident that Congress recognized that the *duty* of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as interstate carriers by rail were concerned the *entire body of such services should be included together under the single term 'transportation' and subjected to the provisions of the Act respecting reasonable rates and the like.*" (Italics supplied.)

A "concession" cannot exist in connection with a "transportation" service covered by a tariff that is uniformly observed. It is a notorious fact that appellants, in common with nearly all other rail carriers in the United States, because of many adverse economic circumstances beyond their control, cannot and do not, at the present time, obtain full "cost", including interest on investment and depreciation, for the transportation services which they are rendering. It cannot in reason be contended that they are extending "concessions" to shippers in all these below-cost operations. The tariff charges are what the law requires and all it permits the carrier to collect. Manifestly no concession can arise from collecting such lawful charges.

It is well settled that a carrier may, under some circumstances, even be compelled to render for less than cost services which it holds itself out by published tariff to perform. *St. Louis etc., R. Co. v. Gill*, 156 U. S. 649, 665-666;

Atlantic Coast Line v. North Carolina Commission, 28 U. S. 1, 267; *Northern Pacific R. Co. v. North Dakota*, 28 U. S. 585, 600; *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 268. In *Atchison T. & S. F. R. Co. v. United States*, 203 Fed. 56, 59, the Court stated that a carrier has no constitutional right to a charge for each distinct kind of service which will equal its proportionate share of the entire operating expenses. The following decisions of the Commission are to the same effect:

- Louisville & Nashville R. R. Coal and Coke Rate*,
26 I. C. C. 20, 29-30;
Stonega Coke & Coal Co. v. L. & N. R. Co., 39 I. C. C. 523, 541-542;
Pacific Lumber Co. v. N. W. P. R. Co., 51 I. C. C. 738, 757;
Constructive Mileage over Poughkeepsie Bridge,
66 I. C. C. 230, 233;
Nebraska Livestock case, 89 I. C. C. 444, 456; and
Rates on Cotton to Gulf Ports, 123 I. C. C. 685, 702.

The Commission's holding in the instant case that a carrier's failure to get "cost" for an in-transit service is a violation of law, notwithstanding that the tariff charge is collected, is in direct contradiction of a prior decision by it that was affirmed by the District Court in *Alton & S. R. Co. v. United States*, 49 F. (2nd) 414. The carriers there sought to enjoin an order by the Commission requiring them separately to publish, under section 6 of the Act, their charges for refrigeration service on the ground that the charge fixed by the Commission did not, as was admitted, cover all costs incident to that service. In denying the injunction, the Court, affirming in this respect the interpretation the Commission had adopted, held (pp. 427-8):

"To attribute to Congress, in the enactment of section 6 of the Interstate Commerce Act * * * an intention to establish a system of accounting so rigid that any failure to apply to each tariff charge every element of cost and profit which in strict and scientific accounting could reasonably be assigned to that charge, would not only completely ignore the fundamental purpose of Congress in the adoption of section 6, that of advising the shipper of the amount he must pay for the transportation of his freight, but would incorporate into the system of rate making a rigidity entirely inconsistent with the powers conferred upon the Interstate Commerce Commission, and would thus introduce into the system rules which would make difficult, if not impossible, the ascertainment of the proper charges to be assigned to the main line freight rate and to each ancillary charge. Instead of clearing a channel for reasonably intelligent rate making, such construction would introduce artificial obstructions in a channel already sufficiently difficult and tortuous."

The principle that a carrier is not, as a matter of law, entitled to its full cost for every service it performs is in irreconcilable conflict with the decision of the Commission in the instant case. If for each separate service a carrier may not demand full and separate cost, how can it be held guilty of making concessions wherever it fails to get such cost?

It is not essential to our argument that there be a technical determination that the service is "transportation"; it is sufficient that the service is a proper subject of tariff publication, as the Commission has held, *supra*, page 28, and that a tariff covering it has been duly filed and is being uniformly applied. A finding that services may cost more than the tariff charges (or, for that matter, a finding that the services are worth more than the tariff charges) is insufficient to support a conclusion that the shippers for whom the tariff services are rendered without discrimination receive concessions or any other unlawful advantages in connection with such services. The very fact that these services are held out pursuant to tariff, coupled with the lack

of any claim or finding that appellants have failed to collect the tariff charges, means that these services are uniformly open and available to the entire public on the one common basis stated in the tariff. In these circumstances there is no violation of law unless it is additionally shown that the tariffs actually operate in some unlawful manner. There is and can be no such showing with respect to the in-transit tariffs here in question.

Section 6 of the Act is not violated because that section merely requires that all charges shall be published in tariffs and that such tariffs shall be uniformly observed and that no carrier shall "refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are specified in such tariffs."

There can be no violation of the Elkins Act because the thing condemned by it is departure from published tariffs, which obviously does not happen, since there is no assertion that appellants are not collecting their tariff charges for the in-transit services. The contrary is admitted.

Section 2 of the Interstate Commerce Act is not violated for it condemns the collection from one person for any service of "greater or less compensation" than is collected from another for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions". The essence of this section is that it prohibits the collection from two shippers of different charges for the same service. *Interstate Commerce Commission v. Baltimore & Ohio R. Co.*, 145 U. S. 263; *Wight v. United States*, 167 U. S. 512. Here, the tariff charges are collected from all. The Commission, by Chairman Cooley, established the principle, in one of the early cases under the Act, that section 2 is not violated when tariff provisions are equally available to all. *Crews v. Richmond & Danville R. R. Co.*, 1 I. C. C. 401, 1 Int. Com. Rep. 703, 712.

The same principle was followed in *Martin v. Chicago B. & Q. R. Co.*, 2 I. C. C. 25; *American Round Bale Press Co. v. Atchison T. & S. F. R. Co.*, 32 I. C. C. 458, 462; *Wells & Son v. Chicago B. & Q. R. Co.*, 161 I. C. C. 145, 148. That "impartiality and publication" satisfy the requirements of law as to "in-transit" storage was stated in *American Warehousemen's Ass'n v. Illinois Central R. Co.*, 7 I. C. C. 556.

Section 3 is not violated because the in-transit services are uniformly open to the public under the provisions of tariffs concededly complied with. This precludes a claim of preference and prejudice under section 3 with respect to such services.

In the very nature of things, there can be no concession in connection with an in-transit service covered by a tariff, so long as the stated tariff charge is collected. If the tariff charge for a particular in-transit service is actually collected there is manifestly no concession given as to *that* service. If as to that service there is no concession, it must follow that that service cannot cause a concession as to road-haul rates which are likewise uniformly applied in compliance with the tariffs.

POINT 4.

Since the order is void as to appellants' leases, storage, and in-transit services, it will, unless it is set aside and its enforcement is restrained, deprive appellants of their liberty and property in contravention of the fifth amendment.

There can be no question that the order of the Commission limits appellants in the use of their property and in effect deprives them of their property. Such deprivation can be justified only if, and then only to the extent that, it is a lawful exercise of power under the Interstate Commerce Act,

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enacted pursuant to the power of the Federal Government to regulate commerce.—Compare *St. Louis & S. F. Ry. Co. v. Gill*, 156 U. S. 649, 657; *Louisville & Nashville R. Co. v. McSley*, 219 U. S. 467; *Hamilton v. Kentucky Distilleries Co.*, 21 U. S. 146. If the restrictive order of the Commission is an unlawful exercise of the Commission's regulatory power (as we submit, it is) and cannot be sustained as a valid regulation of commerce, then necessarily its effect is to deprive appellants of their liberty and property in contravention of the Fifth Amendment to the Constitution of the United States. *United States v. Abilene & Southern Ry. Co.*, 265 U. S. 271, 288; *Minnesota Rate Cases*, 230 U. S. 352, 434; *Rosenbass Grain Co. v. C. R. I. & P. R. Co.*, 130 Fed. 46.

It is established in the decisions of this Court that where an order of the Interstate Commerce Commission is based upon an improper finding the order is void. *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 27 U. S. 88, 91, citing *United States v. B. & O. S. W. R. R. Co.*, 226 U. S. 14. In the instant case the below-cost finding, for the reasons which have been shown in connection with its application to appellants' leases, storage services, and in-transit services, does not support the order. Unless, therefore, it is set aside and its enforcement is restrained appellants will be deprived of their liberty and property contrary to the Fifth Amendment.

Conclusion.

Appellants respectfully submit that the Commission's order of February 2, 1937, is unlawful and void, and that the final decree of the United States District Court for the

Southern District of New York sustaining said order should be reversed, and that appellants' prayer for injunctive relief should be granted.

October 19, 1938.

Respectfully submitted,

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APPENDIX.

(See page 10, ante)

The following are the portions involved in this case of sections 2, 3 and 6 of the Interstate Commerce Act and section 1 of the Elkins Act.

SEC. 2. [As amended February 28, 1920, June 19, 1934, and August 9, 1935. U. S. Code, title 49, sec. 2.] That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SEC. 3. [As amended February 28, 1920, March 4, 1927, August 9, 1935, and August 12, 1935. U. S. Code, title 49, sec. 3.] (1) It shall be unlawful for any common carrier subject to the provisions of this Act to make, or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic, in any respect whatsoever or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

SEC. 6. [Amended March 2, 1889, June 29, 1906, June 18, 1910, August 24, 1912, August 29, 1916, February 28, 1920, and August 9, 1935. U. S. Code title 49, sec. 6.] (1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print

and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

(2) Any common carrier subject to the provisions of this part receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this part, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production.

(3) No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public publishing as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided*, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further*, That the Commission is hereby authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges or classifications so changed if, in its judgment, not inconsistent with the public interest.

(7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any devise any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Elkins Act, 49 U. S. C., sec. 41(1)

" * * * and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier; as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced."